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5
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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7
8 SHAWNA G. BARTELL,

9 NO. C09-1154-RAJ-JPD

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of
13 Social Security,

14 Defendant.

15
16 REPORT AND
17 RECOMMENDATION

18 Plaintiff Shawna G. Bartell appeals the final decision of the Commissioner of the Social
19 Security Administration (“Commissioner”) which denied her applications for Disability
20 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI
21 of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an
22 administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that
23 the Commissioner’s decision be REVERSED and REMANDED FOR FURTHER
24 PROCEEDINGS.

25 I. FACTS AND PROCEDURAL HISTORY

26 At the time of her administrative hearing, plaintiff was a thirty-seven year-old woman
with a high school equivalency (GED) education. Administrative Record (“AR”) at 36. Her

1 past work experience includes employment as a cleaner in a hospital setting and as a sales
2 attendant. *Id.* Plaintiff was last gainfully employed in 2005. AR at 26.

3 Plaintiff asserts that she is disabled due to degenerative disc disease of the lumbar
4 spine, dysthymic disorder, borderline intellectual functioning, post traumatic stress disorder
5 (“PTSD”), and panic order with agoraphobia. AR at 27. She asserts an onset date of June 20,
6 2005. AR at 26.

7 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 24.
8 Plaintiff requested a hearing, which took place on November 4, 2008. AR at 442-76. On
9 December 1, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits
10 based on his finding that plaintiff could perform a specific job existing in significant numbers
11 in the national economy. AR at 24-38.

12 Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals
13 Council, AR at 5-8, making the ALJ's ruling the "final decision" of the Commissioner as that
14 term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the
15 Commissioner's decision. Dkt. No. 4.

II. JURISDICTION

17 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
18 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed
8 and further administrative proceedings would serve no useful purpose." *McCartey v.*
9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
12 claimant's evidence; (2) there are no outstanding issues that must be resolved
13 before a determination of disability can be made; and (3) it is clear from the
14 record that the ALJ would be required to find the claimant disabled if he
15 considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
17 erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

18 As the claimant, Ms. Bartell bears the burden of proving that she is disabled within the
19 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
20 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
21 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
22 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
23 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
24 are of such severity that she is unable to do her previous work, and cannot, considering her age,
25 education, and work experience, engage in any other substantial gainful activity existing in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
 2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for
 4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
 5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
 6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
 7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
 8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
 9 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
 10 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
 11 or more medically severe impairments, or combination of impairments, that limit her physical
 12 or mental ability to do basic work activities. If the claimant does not have such impairments,
 13 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
 14 impairment, the Commissioner moves to step three to determine whether the impairment meets
 15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
 16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
 17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed
 19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
 20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
 21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
 22 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
 23 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
 24

25 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
 26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can
2 perform other work that exists in significant numbers in the national economy, taking into
3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
5 claimant is unable to perform other work, then the claimant is found disabled and benefits may
6 be awarded.

7 V. DECISION BELOW

8 On December 1, 2008, the ALJ issued a decision finding the following:

- 9 1. The claimant meets the insured status requirements of the Social
10 Security Act through December 31, 2010.
- 11 2. The claimant has not engaged in substantial gainful activity since June
30, 2005, the alleged onset date.
- 12 3. The claimant has the following severe impairments: degenerative disc
13 disease of the lumbar spine, dysthymic disorder, borderline intellectual
14 functioning (BIF), post traumatic stress disorder (PTSD) and panic
disorder with agoraphobia.
- 15 4. The claimant does not have an impairment or combination of
16 impairments that meets or medically equals one of the listed
impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 17 5. After careful consideration of the entire record, the undersigned finds
18 that the claimant has the residual functional capacity to perform
19 medium work as defined in 20 CFR 404.1567(c) and 416.967(c). The
20 claimant can lift occasionally 50 pounds maximum and 25 pounds
frequently; stand and walk up to six hours out of 8 hour work day; sit
21 up to six hours out of eight work day. She can do pushing or pulling
and operation of hand and/or foot controls within the limits of lifting
and carrying. There are no manipulative or environmental limitations.
22 She can climb stairs, but she should never climb ladders, ropes or
scaffolds. She has no limitations on stooping or bending and can
23 occasional crawl. Additionally, the claimant retains the mental
capacity to adequately perform the mental activities generally required
24 by competitive remunerative, unskilled work as follows: understand,
remember and carry out simple instructions compatible with unskilled
work; would have average ability to perform sustained work activities
(i.e. can maintain attention and concentration; persistence and pace) in

1 an ordinary work setting on a regular and continuing basis (i.e., 8
2 hours a day, for 5 days a week, or an equivalent work schedule) with
3 customary tolerances of employers rules regarding sick leave and
4 absence. She can make judgment commensurate with the functions of
5 unskilled work i.e., simple work-related decisions; respond
6 appropriately to supervision, co-workers and work situations; and deal
7 with changes all within a routine work setting not dealing with the
8 general public as in a retail sales position. However, incidental
9 contact with the general public is not precluded as would occur in
10 cleaning positions such as in a hotel or motel.

11

6. The claimant is unable to perform any past relevant work.
7. The claimant was born on [REDACTED], 1971² and was 34 years old, which
9 is defined as a younger individual age 18-49, on the alleged disability
onset date.
10. The claimant has at least a high school education and is able to
11 communicate in English.
12. Transferability of job skills is not an issue in this case because the
13 claimant's past relevant work is unskilled.
14. Considering the claimant's age, education, work experience, and
15 residual functional capacity, there are jobs that exist in significant
16 numbers in the national economy that the claimant can perform.
17. The claimant has not been under a disability, as defined in the Social
18 Security Act, from June 30, 2005 through the date of this decision.
19. The claimant's substance abuse disorder is not a factor material to the
20 finding of disability.

21 AR at 26-37.

22

VI. ISSUES ON APPEAL

23 The principal issues on appeal are:

24

1. Did the ALJ Err by Finding that Plaintiff's Severe Impairments Did
25 Not Constitute a Listing?
2. Did the ALJ Err in this Treatment of the Medical Evidence?

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² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

3. Did the ALJ Err in His Adverse Credibility Assessment?
4. Did the ALJ Err in His RFC Assessment By Concluding that Plaintiff Was Capable of Performing Work at the Medium Exertional Level?

Dkt. No. 14 at 8-19.

VII. DISCUSSION

A. The ALJ Did Not Err in Making an Adverse Credibility Determination

Plaintiff argues that the ALJ erred by failing to find plaintiff completely credible as she discussed her limitations. A determination of whether to accept a claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR 96-7p (1996). First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988). Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

When evaluating a claimant's credibility, the ALJ must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints; general findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

1 Among other things, plaintiff asserted that she had a hard time leaving the house (AR at
2 452), that she spent most of the day in her room, sleeping, crying, or watching television, (AR at
3 453), and that she thought "all the time" about her father's death, as he had been shot by the police,
4 although she did not witness the shooting (AR at 455-56). She also testified that she had anxiety
5 attacks two or three times a week (AR at 456), but that medication helped her symptoms (AR at
6 457). She did not believe she could return to work as a sales attendant because she had a hard time
7 being around people and because she was in pain. She estimated she could stand for only 10 to 15
8 minutes (AR at 461-62) and that she was uncomfortable with even very brief interaction with
9 others. AR at 462-63.

10 The ALJ found that plaintiff's impairments were not as limiting as she claimed. He
11 noted that plaintiff admitted she could care for all of her personal needs and hygiene, prepare
12 meals, perform household chores, and care for her granddaughter. AR at 34, 94-95. She also
13 reported that she left the house once or twice a day and had no problems shopping for food or
14 household items twice a week for an hour, activities he concluded which were inconsistent
15 with her self-report. AR at 96.

16 In addition to these activities, the ALJ determined that plaintiff's ability to work for
17 several months after her alleged onset date was inconsistent with her claims of symptoms. AR
18 at 34. Plaintiff worked for several months after her alleged onset date as a housekeeper. AR at
19 448-49. She testified that she was able to perform this job despite any alleged physical
20 difficulties. AR at 449. It was not unreasonable for the ALJ to conclude that this detracted
21 from her claim that she could not stand for more than 10 to 15 minutes (Tr. 462). *Id.* A tendency
22 to exaggerate is a legitimate consideration in determining credibility. *Tonapetyan v. Halter*, 242
23 F.3d 1144, 1148 (9th Cir. 2001).

24 The ALJ also found that plaintiff's claim that she became unable to work in June 2005 was
25 undermined by her lack of employment history prior to her alleged onset date of disability. AR at
26 35. Plaintiff's earning records show that from 1991 to 2006, she earned over \$10,000 only during

1 2 years. The fact that plaintiff has “an ‘extremely poor work history’ and ‘has shown little
 2 propensity to work in her lifetime,’” was a specific, clear, and convincing reason to discredit her
 3 claimed inability to work. *Thomas*, 278 F.3d at 959. Further, the ALJ properly inferred that
 4 plaintiff’s claims of disability, in light of her poor work history and receipt of free rent from her
 5 grandparents raised an issue of motivation and secondary gain. Evidence of self limitation and lack
 6 of motivation by a claimant are appropriate considerations in determining the credibility of a
 7 claimant’s excess symptom testimony. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir.
 8 2001).

9 Finally, the ALJ also concluded plaintiff’s claims of symptoms were not credible as
 10 they were not supported by findings in the medical evidence (Tr. 34). For example, plaintiff’s
 11 claim that she could only stand for 10 to 15 minutes is contradicted by Dr. Kim’s assessment
 12 that Plaintiff could perform light work. AR at 225, 462. In judging credibility, the ALJ may
 13 consider “testimony from physicians and third parties concerning the nature, severity, and
 14 effect of the symptoms of which [claimant] complains.” *Id.* at 958-59, quoting *Light v. Soc.
 15 Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ’s adverse credibility determination is
 16 supported by substantial evidence as that term is defined above. The ALJ did not err.

17 B. The ALJ Erred, In Part, In His Assessment of the Medical Evidence

18 At step 3 of the sequential evaluation process, the Commissioner must determine
 19 whether the claimant’s “severe” impairments, individually or in combination, meet or equal an
 20 Appendix 1 Medical Listing and are “presumptively” disabling. 20 CFR §404.1520(d). If a
 21 claimant’s severe impairments meet or equal a listing, the claimant is found disabled, and the
 22 inquiry ends. *Id.* The Listings for mental impairments are found at 20 CFR 404 Subpart P,
 23 Appendix 1, 12.00 et. seq.

24 At step 2 of the sequential evaluation process, the ALJ found that plaintiff has severe
 25 mental impairments of dysthymic disorder, borderline intellectual functioning (“BIF”), PTSD,
 26 and a panic disorder with agoraphobia. AR at 27, Finding No. 3. These impairments correlate

1 to Listings 12.04 for affective disorders, 12.05 for mental retardation, and 12.06 for anxiety
2 disorders. 20 CFR 404 Subpart P, Appendix 1, 12.04, 12.05, and 12.06. At step 3, the ALJ
3 found that none of plaintiff's mental impairments meet or equal any listed impairment. AR at
4 30. Plaintiff assigns error to this finding. In addition, plaintiff claims the ALJ erred by
5 ignoring Dr. Harmon's conclusion that plaintiff "appeared" to meet the criteria for a 12.04 and
6 12.02 Listing.

7 Although the ALJ stated that "No treating or examining physician has mentioned
8 findings equivalent in severity to the criteria of any listed impairment," (AR at 30), that
9 conclusion is incorrect. The Commissioner concedes that Drs. Parlatore, Lind, Ms. Gibson and
10 Ms. LaHatt provided opinions that would be equivalent to the severity criteria of the
11 Commissioner's listings for an affective disorder (12.04) and an anxiety disorder (12.06) Dkt.
12 No. 15 at 13. However, the Commissioner argues that the ALJ properly rejected these
13 opinions. As to the separate claim of a Listing pursuant to 12.05(c), the Commissioner claims
14 the plaintiff is relying upon an incorrect IQ score. *Id.* at 14.

15 *1. 12.04 and 12.06 Listings*

16 Whether the ALJ erred by failing to find a 12.04 or 12.06 Listing depends upon
17 whether the ALJ properly evaluated the medical evidence offered by Drs. Parlatore, Lind, Ms.
18 Gibson and Ms. LaHatt. If the ALJ evaluated the opinions properly, then the statement
19 included in his opinion that no examining physician found that plaintiff's metal impairments
20 met or equaled a Listing is immaterial. If the ALJ did not properly evaluate the medical
21 opinions, this case must be reversed.

22 *2. Standards for Review of Medical Evidence*

23 As a matter of law, more weight is given to a treating physician's opinion than to that
24 of a non-treating physician because a treating physician "is employed to cure and has a greater
25 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d
26 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating

1 physician's opinion, however, is not necessarily conclusive as to either a physical condition or
2 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
3 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining
4 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not
5 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,
6 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough
7 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
8 making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
9 merely state his conclusions. "He must set forth his own interpretations and explain why they,
10 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
11 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,
12 157 F.3d at 725.

13 The opinions of examining physicians are to be given more weight than non-examining
14 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
15 uncontradicted opinions of examining physicians may not be rejected without clear and
16 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
17 physician only by providing specific and legitimate reasons that are supported by the record.
18 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

19 Opinions from non-examining medical sources are to be given less weight than treating
20 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
21 opinions from such sources and may not simply ignore them. In other words, an ALJ must
22 evaluate the opinion of a non-examining source and explain the weight given to it. Social
23 Security Ruling ("SSR") 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
24 more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a
25 non-examining doctor's opinion may nonetheless constitute substantial evidence if it is
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1 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
 2 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

3 a. Anselm Parlatore, M.D.

4 In July 2005, Dr. Parlatore evaluated plaintiff. AR at 172-75. He diagnosed plaintiff
 5 with PTSD, panic disorder and dysythmia. AR at 173. He found that she had only mild
 6 cognitive limitations, but also found she would have marked limitations in her ability to relate
 7 to co-workers and supervisors and the public, and had severe limitations regarding responding
 8 appropriately to pressures in the workplace. AR at 174. In July 2008, Dr. Parlatore completed
 9 a questionnaire, stating plaintiff had affective disorder and anxiety disorder that each resulted
 10 in marked restrictions in activities of daily living, marked difficulties in social functioning,
 11 frequent deficiencies of concentration, persistence or pace, and frequent episodes of
 12 decompensation, each of extended duration. AR at 210-15.

13 b. Michelle Gibson, ARNP

14 Nurse Gibson evaluated plaintiff in March 2008. Plaintiff was initially referred in
 15 February 2007, but plaintiff missed her evaluation at that time, and also missed 8 out of 11
 16 scheduled case management appointments. AR at 341. In her 2008 evaluation, Nurse Gibson
 17 diagnosed plaintiff with major depressive episode, recurrent without psychotic features, PTSD,
 18 and amphetamine abuse, in remission. She assigned a Global assessment function rating
 19 ("GAF") of 50.³ Nurse Gibson also provided answers to written interrogatories in October
 20

21 ³ The GAF score is a subjective determination based on a scale of 1 to 100 of "the
 22 clinician's judgment of the individual's overall level of functioning." AMERICAN PSYCHIATRIC
 23 ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).
 24 A GAF score falls within a particular 10-point range if either the symptom severity or the level
 25 of functioning falls within the range. *Id.* at 32. For example, a GAF score of 51-60 indicates
 26 "moderate symptoms," such as a flat affect or occasional panic attacks, or "moderate difficulty
 in social or occupational functioning." *Id.* at 34. A GAF score of 41-50 indicates "[s]erious
 symptoms," such as suicidal ideation or severe obsessional rituals, or "any serious impairment
 in social, occupational, or school functioning," such as the lack of friends and/or the inability
 to keep a job. *Id.* A GAF score of 31-40 indicates "some impairment in reality testing and

1 2008, opining that plaintiff's depression resulted in frequent deficiencies in concentration,
2 persistence or pace and that her PTSD results in extreme difficulties in maintaining social
3 functioning. AR at 401-02.

4 c. Karen LaHatt, LMHC

5 Ms. LaHatt is a licensed mental health counselor who evaluated plaintiff. In written
6 interrogatories, she opined that plaintiff's depression resulted in marked limitations of social
7 functioning; and constant deficiencies of concentration, persistence or pace; and that her PTSD
8 results in marked limitations in social functioning and marked deficiencies of concentration.
9 AR at 249, 252.

10 d. The ALJ Erred Regarding Dr. Parlatore, Nurse Gibson and Ms.
11 LaHatt

12 The ALJ did not state what weight he gave to the opinions of Dr. Parlatore, Nurse
13 Gibson and Ms. LaHatt, but he evidently rejected them.

14 As for the opinion evidence, Dr. Parlatore, the claimant's therapist, and the
15 claimant's nurse practitioner have all completed evaluations of the claimant, but
16 they have not provided supportive objective evidence from their evaluations to
17 support the limitations that they have assessed (Exhibits 3F; 8F; 11F; 21F). The
18 claimant's activities suggest that she has the ability to get along with others, to
maintain attention and concentration and deal with some stress [better] than
these providers have indicated. The claimant has demonstrated a good ability to
maintain appropriate behavior in every evaluation in the record.

19 AR at 35.

20 Plaintiff claims that the ALJ's statement that the providers failed to provide supportive
21 objective evidence is not supported by the record. She is correct. Dr. Parlatore completed
22 Section D of the Department of Social and Health Services ("DSHS") form setting forth his
23 clinical findings. AR at 172-75. Nurse Gibson provided her psychiatric evaluations. AR at
24 342. Ms. LaHatt stated that her assessments were based in part on plaintiff's hyper-startle

25
26 communication" or "major impairment in several areas, such as work or school, family
relations, judgment, thinking or mood . . ." *Id.*

1 response and hyper-vigilance. AR at 253. Although the ALJ also cited reasons that could
2 support his ultimate conclusions relating to credibility, reliance on self-reporting, and daily
3 activities, a major justification given by the ALJ does not withstand scrutiny. For this reason,
4 this case must be remanded for further proceedings to reevaluate the medical opinions of Dr.
5 Parlatore, Nurse Gibson and Ms. LaHatt.

6 3. *12.05(c) Listing*

7 To meet the requirements of 12.05(c), a claimant must have a valid verbal,
8 performance, or full scale IQ of 60 through 70, and a physical or other mental impairment
9 imposing an additional and significant work-related limitation of function. 20 CFR 404
10 Subpart P, Appendix 1, Listing 12.05. Here, the ALJ found that the “paragraph C” criteria of
11 listing 12.05 are not met because the claimant does not have a valid verbal, performance, or
12 full scale IQ of 60 through 70 and a physical or other mental impairment imposing an
13 additional and significant work-related limitation of function.” AR at 32. Plaintiff claims the
14 ALJ erred asserting plaintiff had a severe mental impairment of borderline intellectual
15 functioning based on Dr. Lind’s report, which included a “Full Scale IQ of 67 (borderline),”
16 (AR at 27), in addition to severe physical impairments. However, the ALJ misreported Dr.
17 Lind’s results. A review of Dr. Lind’s report confirms the Commissioner’s argument that the
18 ALJ misread Dr. Lind’s report, and that Dr. Lind reported a Full Scale IQ of 74 for plaintiff.
19 AR at 170. In her reply, plaintiff does not contend otherwise. The ALJ did not err in
20 concluding that plaintiff did not meet a 12.05(c) Listing.

21 4. *12.02 Listing*

22 On September 18, 2008, Dr. Dana Harmon completed a Certification for Medicaid,
23 stating:

24 Shawna appears to meet the SSA criteria for 12.04, Affective Disorders, and
25 12.02, Organic Mental Disorders. Dr. Lind’s psychological evaluation
26 diagnosed her with a Major Depressive Disorder and borderline intellectual
functioning, with a “marked” level of severity. Shawna’s problems with school

1 and learning and need for special education services would also be significant
2 obstacles to her employment or vocational rehabilitation.

2 AR at 388.

3 It appears that Dr. Harmon's opinions are based on his review of Dr. Lind's
4 psychological evaluation. To a certain extent, therefore, it would seem that Dr. Harmon's
5 conclusions are dependent upon Dr. Lind's conclusions. Although this may seem self-evident,
6 the ALJ did not make reference to the opinion of Dr. Harmon. Dr. Harmon's opinion is
7 significant probative evidence, and the failure to discuss this evidence requires a remand.

8 *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984).

9 C. The ALJ Did Not Err In His Assessment of the Medical Opinions of Ellen
10 Walker Lind, Ph.D

11 In January and February 2006, Dr. Lind performed a psychological evaluation of
12 plaintiff. AR 166-171. She diagnosed plaintiff with PTSD, panic disorder without
13 agoraphobia, dysthymic disorder, and BIF. She assessed plaintiff's GAF at 38. The ALJ
14 accorded no weight to Dr. Lind's opinion.

15 The undersigned gives no weight to Dr. Lind's opinion as she apparently relied
16 quite heavily on the subjective report of symptoms and limitations provided by
17 the claimant, and seemed to uncritically accept as true most, if not all, of what
18 the claimant reported. Yet, as explained elsewhere in this decision there exist
19 reasons for questioning the reliability of the claimant's subjective complaints.
Furthermore, there is no supportive objective documentation for these opinions
that the claimant has very limited functional ability.

20 AR at 35.

21 Although Dr. Lind performed some intelligence testing (AR at 170-71), the ALJ did not
22 err by rejecting her opinions. Plaintiff argues that the finding that Dr. Lind relied upon the
23 subjective reports of symptoms and limitations by plaintiff for support is speculation. That
24 assessment is not accurate. Dr. Lind's report is replete with references to self-reports. AR
25 166-169. During her evaluation, she was reported to be cooperative, and oriented to person,
26 place, time and situation. She demonstrated no evidence of psychomotor agitation or

1 retardation. Her speech was normal. She was able to name current and past presidents and
 2 recalled two of three objects after a five-minute delay. She recalled seven digits forward and
 3 four backwards. She was able to complete a serial counting task to 40 with one error, and
 4 correctly spelled the word “world” forward and backward. Her abstract reasoning skills were
 5 estimated to be below average.

6 Nevertheless, she self-reported to Dr. Lind that she suffered from depression for a long
 7 time, that she had panic attacks that caused her to cry and to be unable to breathe, that she had
 8 “ongoing” problems with PTSD, and that her current family situation was quite stressful. AR
 9 at 166-170. In September 2008, plaintiff reported fatigue, low energy, and that “focus is
 10 difficult.” AR at 384. Notwithstanding the self-reports of focus difficulties, she drove herself
 11 to her appointment, she arrived on time, there was no evidence of psychomotor agitation or
 12 retardation, and her speech was reported normal. She was also able to remember 3 out of 3
 13 objects after 5 minutes, and could remember 6 digits forward and 4 digits backwards. AR at
 14 386.

15 The ALJ may reject a doctor’s opinion when it is “conclusory, brief, and unsupported
 16 by the record as a whole. . . or by objective medical findings.” *Batson v. Comm’r of Soc. Sec.*
 17 *Admin.*, 359 F. 3d 1190, 1195 (9th Cir. 2004). Moreover, in light of the adverse credibility
 18 determination made by the ALJ, it was not inappropriate for the ALJ to reject reports based on
 19 a claimant’s self-reporting. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir 2008). The
 20 ALJ did not err by assigning no weight to the opinion of Dr. Lind.

21 D. The ALJ Erred in His Assessment of the Opinion of Chi-Na Kim, M.D., but the
Error is Harmless

22 Plaintiff was evaluated by Dr. Kim in 2005, as part of a DSHS medical review. AR at
 23 332-27. Dr. Kim concluded that plaintiff was able to work, but restricted the work to the light
 24 exertional level. The ALJ rejected Dr. Kim’s assessment.

25 Dr. Kim’s opinions are not granted probative weight as he saw the claimant
 26 only once for a short evaluation for general assistance. Further, there lacks a

narrative discussion and supportive documentation for the opinion of limiting the claimant to light work.

AR at 35. The ALJ erred when he concluded that there no objective evidence. Dr. Kim noted in the report that there was limited range of motion in plaintiff's back, especially her lower back, and noted "Leg raise [positive] Left 60 degrees." AR at 224. However, Dr. Kim also reported the severity rating was only "mild." AR at 225. The mild severity rating was not noted by the ALJ as the reason for rejecting Dr. Kim's opinion, and the reasons offered are somewhat contradicted by the record. Accordingly, the ALJ erred in his treatment of Dr. Kim's opinion.

This error, however, is harmless. Because he did not give probative weight to Dr. Kim’s opinion, the ALJ concluded that plaintiff had an RFC that permitted her to engage in work with a medium exertional capacity. AR at 32. Nevertheless, at Step 5 of the sequential disability evaluation process, based on the Vocational Expert (“VE”) opinion, the ALJ concluded that there were jobs in the national economy that plaintiff could perform, but each of the jobs identified required only a “Light” exertional capacity, consistent with Dr. Kim’s opinion.

There was no requirement that the ALJ adopt Dr. Kim's limitation to a job involving only a "Light" exertional capacity. However, the ALJ's proffered reasons for rejecting Dr. Kim's opinions do not withstand scrutiny. Nevertheless, because the jobs found at Step 5 were consistent with Dr. Kim's conclusions, any error that the ALJ committed must be considered harmless.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. Specifically, the undersigned recommends that the Commissioner's adverse credibility determination, the finding that plaintiff did not meet a Listing, pursuant to 12.05(c),

1 and the assessment of Dr. Lind's opinion be affirmed. In addition, the undersigned further
2 recommends that the error in treatment of Dr. Kim's opinion be treated as harmless error.

3 The undersigned also recommends that on remand, the Commissioner be directed to
4 reconsider the medial opinions of Dr. Parlatore, Nurse Gibson and Ms LaHatt, in light of the
5 objective evidence that supports the opinions generally, and specifically whether the plaintiff's
6 impairments are equivalent to a 12.04 and 12.06 Listing. Finally, the undersigned recommends
7 that the Commissioner be directed to review the medical opinion of Dr. Harmon, and assess
8 whether plaintiff's impairments are the equivalent to a Listing pursuant to 12.02 and 12.04.

9 A proposed order accompanies this Report and Recommendation.

10 DATED this 30th day of April, 2010.

11 
12 JAMES P. DONOHUE
13 United States Magistrate Judge

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